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IN THE
COURT OF APPEALS OF INDIANA

TODD E. BARLOW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0710-CR-458
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0302-FB-270, 03D01-0705-FD-939, and 03D01-0704-CM-748

May 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Todd Barlow pleaded guilty to Theft,[1] a class D felony, and admitted to violating his probation under a different cause. In this consolidated appeal, Barlow challenges the sentence imposed by the trial court.

We affirm.

This case involves three separate causes: 03D01-0302-FB-270 (FB-270), 03D01-0705-FD-939 (FD-939), and 03D01-0704-CM-748 (CM-748). Under FD-939, the State charged Barlow with class D felony residential entry and class D felony theft. Under FB-270, the State petitioned to revoke Barlow's probation, which was based on his prior felony convictions for burglary and theft in October 2003. Under CM-748, the State charged Barlow with resisting law enforcement.

The facts giving rise to the charges under FD-939 are that between January and March 2007, Barlow was living on property owned by John and Jean Phillips in Columbus, Indiana. While living there, Barlow stole two guns, jewelry, lawn equipment, and a microwave and pawned the items in order to finance his drug habit. Barlow admitted that he stole the items with the intent to deprive the Phillipses of the use and value of their property. The State charged Barlow with residential entry and theft, both as class D felonies.

Pursuant to a plea agreement, Barlow agreed to plead guilty to class D felony theft under FD-939 and admit to violating his probation under FB-270. In exchange, the State agreed to dismiss the residential entry charge under FD-939 and the resisting law enforcement charge under CM-748. At a plea hearing on July 16, 2007, the trial court

[1] Ind. Code Ann. § 35-43-4-2 (West, PREMISE through 2007 1st Regular Sess.).

accepted Barlow's guilty plea and found that he had violated his probation. The trial court held a sentencing hearing on August 14, 2007. At the hearing, the trial court noted that Barlow's criminal history included two juvenile adjudications, seven convictions for misdemeanors, and that the current offense (class D felony theft) was his fifth felony conviction. The trial court determined that Barlow deserved an aggravated sentence based upon his criminal history alone. The trial court did not identify any mitigating circumstances. The trial court ordered that Barlow serve his suspended sentence under FB-270, less credit time, and that he serve two and one-half years for the theft conviction under FD-939, such sentence to run consecutive to the sentence under FB-270.[2]

On appeal, Barlow challenges the sentence imposed. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v.* State, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Under the new sentencing scheme, a court may impose any sentence authorized by statute and permissible under the Indiana Constitution regardless of the presence or absence of aggravating or mitigating circumstances. *Id*. Thus, in *Anglemyer*, our Supreme Court held:

> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors.

Anglemyer v. State, 868 N.E.2d at 491. Therefore, "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not

[2] Barlow requested that he be sentenced to two and one-half years. Barlow further requested that the sentence be executed, admitting that he was not a candidate for probation.

subject to review for abuse." *Id.* Circumstances under which a trial court may be found to have abused its discretion include: (1) failure of the trial court to enter a sentencing statement, (2) entering a sentencing statement that includes reasons not supported by the record, (3) entering a sentencing statement that omits reasons clearly supported by the record, or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482.

Barlow argues that the trial court abused its discretion by improperly considering as an aggravating circumstance his history of misdemeanor charges that were not prosecuted. We recognize that arrests and charges do not constitute evidence of criminal history. *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). Here, in reviewing Barlow's criminal history, the trial court indicated that Barlow had accumulated "seven misdemeanors". *Transcript* at 22. Reviewing the pre-sentence investigation report, Barlow had accumulated at least that many by our count, in addition to numerous other run-ins with the law that were never prosecuted. Clearly the trial court was not considering Barlow's full history of misdemeanor charges as an aggravating circumstance.[3] The trial court therefore did not abuse its discretion in considering Barlow's criminal history as justification for an enhanced sentence.

Barlow also argues that the trial court abused its discretion in failing to consider his guilty plea as a mitigating circumstance. We acknowledge that Barlow's guilty plea

[3] Nevertheless, while a record of arrest does not constitute evidence of criminal history, it may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. *See Cotto v. State*, 829 N.E.2d 520. Thus, such information may be relevant to the assessment of the defendant's character in terms of the risk that he will commit another crime. *Id.*

is entitled to some degree of mitigating weight. It is well established that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return. *See Cotto v. State*, 829 N.E.2d 520. The extent to which a guilty plea is mitigating, however, will vary from case to case. *See Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). As has been frequently observed, "a plea is not necessarily a significant mitigating factor." *Cotto v. State*, 829 N.E.2d at 525; *see also Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one"), *trans. denied*.

Here, Barlow received a significant benefit by pleading guilty in that the State dismissed a class D felony residential entry charge and a resisting law enforcement charge under a separate cause. Further, it appears as though Barlow's decision to plead guilty was a pragmatic decision. Barlow was renting a house from the Phillipses and thus had easy access to the stolen items. Upon returning home, the Phillipses found several items missing from their home. Barlow admitted to Mr. Phillips that he had taken the missing items and also admitted to a police officer, after waiving his Miranda rights, that he took items from the Phillipses' home and sold them. Therefore, while the trial court should have found Barlow's guilty plea constituted a mitigating circumstance, it was not entitled to great weight.

In his brief, Barlow states that his sentence is inappropriate in light of the nature of the offense and the character of the offender and requests that we revise his sentence.

Barlow, however, provides no cognizable argument in this regard, and thus, he has waived his right to challenge the appropriateness of his sentence on appeal. *See* Ind. Appellate Rule 46(A)(8)(a).

Waiver notwithstanding, we note that we have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Indiana Appellate Rule 7(B); *Anglemeyer v. State*, 868 N.E.2d 482. Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Thus, "we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

Here, Barlow argues that "[t]he evidence in the record does not support a fully executed sentence." *Appellant's Brief* at 9. We note, however, that during the sentencing hearing, Barlow admitted that he was not a candidate for probation and thus he requested an executed sentence of two and one-half years. This is precisely the sentence he received. Further, we observe that Barlow's extensive criminal history reflects poorly on his character. By the age of thirty-eight, Barlow had accumulated numerous misdemeanor convictions and at least four prior felony convictions for possession of marijuana, dealing marijuana, burglary, and theft. Barlow's extensive criminal history, by itself, justified the enhanced sentence. Barlow has not demonstrated that his sentence is inappropriate.

Judgment affirmed.

BAILEY, J., and KIRSCH, J., concur.